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No. 274

In the Supreme Court of the United States

October Term, 1956.

JOSEPH CHITTO, *et al.*, Members, and as the Representatives of, and on the Relation of, THE CHOCTAW INDIANS EAST OF THE MISSISSIPPI RIVER,

vs.

THE UNITED STATES.

THE UNITED STATES,

vs.

JOSEPH CHITTO, *et al.*, Members, and as the Representatives of, and on Relation of, THE CHOCTAW INDIANS EAST OF THE MISSISSIPPI RIVER.

Appeal of the Choctaw Nation from Order of the Indian Claims Commission Denying Motion for Leave to Intervene.

BRIEF OF CHOCTAW NATION, INTERVENER, IN OPPOSITION.

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IN THE SUPREME COURT OF THE UNITED STATES.
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JOSEPH CHITTO, *et al.*, Members, and as the Representatives of, and on the Relation of, THE CHOCTAW INDIANS EAST OF THE MISSISSIPPI RIVER,

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JOSEPH CHITTO, *et al.*, Members, and as the Representatives of, and on Relation of, THE CHOCTAW INDIANS EAST OF THE MISSISSIPPI RIVER.

BRIEF OF CHOCTAW NATION, INTERVENER, IN OPPOSITION.

Statement of Case.

We deem it important to a consideration of the questions presented by the petition for writ of certiorari to make as brief a statement as is possible of the basic facts surrounding this litigation.

Petitioners instituted suit in the Indian Claims Commission pursuant to the provisions of the Act of Congress of August 13, 1946 (60 Stat. 1049), designating themselves as "Choctaw Indians East of the Mississippi River," and alleging as a basis of relief that they are the descendants of Choctaw Indians who qualified for benefits under Article

14 of the Treaty of September 27, 1830 (7 Stat. 333), commonly known as the removal treaty, by the terms of which the Choctaw Indians were to be removed from their original homes in Mississippi to a new domain then known as the Indian Territory, now the present State of Oklahoma. Article 14 of the Treaty of 1830 is that provision of the removal treaty that gave heads of families the option to remain in Mississippi, become citizens of the State, and take 640 acres of land, with each child over ten years of age taking 320 acres, and children under ten 160 acres. A further important provision of Article 14 was to the effect that those who availed themselves of the right to remain and not move with the main body of the tribe West would (*1*) become citizens of the State of Mississippi, and subject to the laws of the State of Mississippi as other citizens; and (*2*) if they ever elected to remove and rejoin the tribe in the West, that they retained the rights of citizens, minus the right to have an interest in the tribal annuities.

The humane purposes of Article 14 were frustrated, impaired and in effect almost completely defeated by (1) the overbearing and lawless acts of the white settlers desiring to take over the Indian lands; (2) by the unfaithful conduct of local Federal agents in refusing to register heads of families who wanted to remain; and (3) by other circumstances over which the intending 14th Article claimants had no control; all of which is detailed at great length in the two cases or opinions dealing with breaches of the removal treaty. See *Choctaw Nation* v. *United States*, 21 Ct. Cls. 59, 119 U. S. 1. Of those electing to remain under Article 14 only 143 heads of families succeeded in securing lands in Mississippi, and a total of 1200 heads of families were driven from their homes by the lawless acts of the white population (aided by the local Indian agent, one

Ward) and the lands attempted to be selected by these Indians were sold by the Government to the white settlers.

The Honorable Claims Commission denied the first and second prayers for relief but gave petitioners judgment on the third count, wherein petitioners prayed in the alternative for a judgment in the sum of $417,656.00.

The Court in ferreting out the origin of the $417,656.00 item will find that it is the amount expressed in dollars and cents found by the Court of Claims (21 Ct. Cls. 59) to have been the actual losses sustained by a group of 191 14th Article Claimants who had received neither land, money nor script. It is to be noted that the $417,656.00 item is only one item involved in *Choctaw Nation* v. *United States*, 21 Ct. Cls. 59, 119 U. S. 1. It is known in departmental, judicial and Indian history as the Net Proceeds case, because it involved and provided restitution for the numerous breaches of the removal and subsequent treaties, the total judgment in the case being for $2,981,247.30. Omitting reference to the numerous acts of Congress, the reports of commissions and departmental investigations into the wrongs suffered by 14th Article Indians, all of which is summarized in *Choctaw Nation* v. *United States*, *supra*, all matters in issue between the Choctaws and the United States came to a definite basis of settlement by the terms of the Treaty of June 22, 1855 (11 Stat. 611). This treaty provided for the review and adjudication of all claims of individuals and all demands of the tribe as a whole, including the claims of petitioners' ancestors. By the terms of Article 12 of that Treaty the Choctaws were to be bound by whatever the United States Senate, after full consideration, found to be due the Choctaws, and the Choctaw Nation became bound to determine to whom payments were due and make such payments to individuals as were found to be just and equi-

table, the settlement and adjustment to be under the advice and direction of the local United States Indian agent. Pursuant to this treaty all claims were reviewed, and a lump sum was found by the Senate to be due the Choctaw Nation. The Senate found that a great many difficulties were presented in arriving at the exact losses suffered by Article 19 claimants, and the claimants under other provisions of the removal treaty, and concluded after considering such complex and difficult problems, that the fairest method of awarding compensation to the Choctaw Nation would be to pay the "net proceeds" received by the Government for the Choctaw lands ceded in Mississippi.

The Senate resolution dealing with the subject directed that the Secretary of the Interior state an account on the basis of the Senate formula, and the Secretary did state an account showing a balance, on all claims, including 14th Article Indians, of $2,981,247.30. By the Act of March 2, 1861 (12 Stat. 222), the Congress appropriated the sum of $250,000.00 to apply on the Senate award, but the Civil War intervened. The Choctaw Nation entered into treaties with the Southern Confederacy and participated in the war as a part of the Confederate Government. No action was taken towards paying the balance of the award for several years after the close of the war.

Meanwhile the Choctaw Tribal Council instructed a delegation to appear in Washington and urge before the Departments and the Congress a final settlement of the Senate award. By the Act of Congress approved March 3, 1881 (21 Stat. 504), the Choctaw Nation was given the right to bring suit in the Court of Claims to recover on all pending claims in existence at that time, including the instant claim involving ancestors of the petitioners herein. In the Court of Claims decision (21 Ct. Cls. 107) the court found the

beneficiaries of Article 14 to be entitled to 225,760 acres of land (which they did not get), valued at $417,656.00. The judgment of the Court of Claims (21 Ct. Cls. 59) was for $658,120.32 on all claims, tribal or individual. In that judgment is the finding of $417,656.00 for claims of Indians having losses under Article 14. On appeal to the Supreme Court, the Court of Claims was reversed, including the findings on which its money judgment was based. The judgment of the Supreme Court was for $2,981,247.30. It entirely wiped out the findings of the Court of Claims and the basis on which the Court of Claims arrived at its conclusions. Under the Act of 1881, *supra*, the Court of Claims was clothed with jurisdiction to "try all questions of differences arising out of treaty stipulations with the Choctaw Nation and to render judgment thereon." In effect, the Supreme Court held that the Act of 1881, *supra*, actually operated to reopen the Senate award (made before the Civil War under the Treaty of 1855) only so far as to cast on the Government the burden of disproving the justness and fairness of the Senate award.

We direct particular attention to the language of Mr. Justice LITTLETON of the Court of Claims (p. 13 of opinion below) where it was said that the Claims Commission made two primary errors. In the first place, Mr. Justice LITTLETON said the judgment of the Court of Claims, entered on the mandate of the Supreme Court decision, did not in fact award any specific sum to 14th Article claimants, nor did the Supreme Court affirm the findings of the Court of Claims that of all the 14th Article claimants only the 191 heads of families who received neither land, script nor money were entitled to any part of the judgment entered in the case. On the contrary, the Supreme Court actually reversed the

holdings of the Court of Claims and the findings on which its judgment was based.

Thus it appears that the Supreme Court actually held that the Court of Claims should have adopted the February 15, 1859 report and award of the Senate made pursuant to the provisions of the treaty of June 22, 1855. This opinion by the Supreme Court closed the longstanding controversy and all litigation, with the result that the Choctaw Nation was awarded a lump sum judgment of $2,981,247.30 less $250,000.00 appropriated and paid by the Act of Congress of March 2, 1861 (12 Stat. 221).

Statutes and Treaties Involved.

STATUTES.

Act of March 3, 1837 (5 Stat. 180);
Act of August 23, 1842 (5 Stat. 513);
Act of March 3, 1845 (5 Stat. 766);
Act of July 22, 1852 (10 Stat. 15);
Act of March 2, 1861 (12 Stat. 221);
Act of March 3, 1881 (21 Stat. 504);
Act of June 29, 1888 (25 Stat. 239);
Act of August 13, 1946 (creating Indian Claims Commission) (60 Stat. 1049).

TREATIES.

Treaty of October 18, 1820 (7 Stat. 212);
Treaty of January 20, 1825 (7 Stat. 234);
Treaty of September 27, 1830 (7 Stat. 233);
Treaty of June 22, 1855 (11 Stat. 611).

(*Note*: In the interest of brevity we do not quote these acts and treaties, as to do so would mean the printing of a vast amount of material.)

REASONS FOR NOT GRANTING THE WRIT.

1. It is respectfully submitted that there is no question of public or general interest involved, and no question of the failure of the Claims Commission and the Court of Claims to give effect to the provisions of the Indian Claims Commission Act of 1946.

2. It was correctly set out by Mr. Justice LITTLETON in the opinion below that the judgment of the Court of Claims, entered on the mandate of the Supreme Court, in *Choctaw Nation* v. *United States,* 119 U. S. 1, did not in fact award any specific sum to 14th Article claimants. On the contrary, Mr. Justice LITTLETON points out that the Supreme Court did not affirm the findings of the Court of Claims that of all the 14th Article claimants only 191 heads of families who received neither land, script nor money were entitled to any part of the judgment. The judgment was a general judgment for the net proceeds of the sales of the lands in Mississippi. Thus the Commission's award in favor of petitioners in taking $417,656.00 as an amount due the petitioners was wholly erroneous.

3. The basic and principal contention of petitioners to the effect that their ancestors' claims were not properly included in the judgment rendered in the net proceeds case, 119 U. S. 1, is not well grounded. Petitioners' ancestors by taking under Article 14 did not lose the rights of citizenship in the Choctaw Nation. That is clear by the very language of Article 14. They were in one sense members of the tribe, and all they would lose in removing West to join the main body would be the right to participate in annuities.[1] The provisions of the Treaty of June 22, 1855 (11

1. *Choctaw Nation* v. *United States,* 81 Ct. Cls. 1.

Stat. 611, Sections 11, 12 and 13), apply as much to losses under Article 14 as to losses sustained by Indians under the other provisions of the treaty. Likewise, the jurisdictional act of March 3, 1881 (21 Stat. 504), sending the case of Choctaw Nation to the Court of Claims, included within its scope all claims, whether tribal or individual, including claims of Indians taking under Article 14. Therefore, the ancestors of petitioners could not have been heard to say that the tribal authorities had no right to include their claims in the suit filed pursuant to the Congressional reference act of 1881, *supra*. Being properly included in the case, the payment of the proceeds of the judgment to the Choctaw Nation, to be distributed to those entitled to benefits, was in keeping with the Treaty of 1855.

4. Petitioners are not an identifiable group within the provisions of the Claims Commission Act of August 13, 1946 (60 Stat. 1049). While having the right under Article 14 to rejoin the tribe and become citizens, those remaining in Mississippi under Article 14 occupied the status of individuals, taking up the ways of the white man and being amenable to laws of the State of Mississippi.[2] The

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2. In *Winton* v. *Amos*, 255 U. S. 372, 65 L. ed. 684, it was said:

"Choctaws who remained in Mississippi under that article (referring to Art. 14) adopted the dress, habits, customs, and manner of living of the white citizens of the state. They had no tribal or band organization or laws of their own, but were subject to the laws of the state. They did not live upon any reservation, nor did the Government exercise supervision or control over them."

In *Eastern Bank of Cherokees* v. *United States*, 117 U. S. 288, 29 L. ed. 880, the Supreme Court said:

"No treaty has been made with them; they can pass no laws; they are citizens of that State and bound by its laws."

In *Conners* v. *United States*, 180 U. S. 271, 45 L. ed. 525, a band is defined:

"To constitute a 'band' we do not think it necessary that the Indians composing it be a separate political entity, recognized as

Court of Claims did not pass upon this question but an issue was made of it before the Commission, and the contention that petitioners had no status as an identifiable group was well grounded and should have been sustained.

5. Conceding that petitioners could be held to be an identifiable group under the Claims Commission Act, the Congress clearly had the plenary power to legislate for them, and the provisions of the Treaty of 1855 and the jurisdictional act of 1881 would be within the plenary powers of Congress.[3] The ancestors of petitioners under the Treaty of 1855 had the right to appear before the Choctaw Claims Commission, and the proof shows that many heirs of such persons did appear and present claims and were allowed awards. The Claims Commission itself properly held that under the Treaty of 1855 and the jurisdictional act of 1881, the ancestors of petitioners were included in the suit instituted by the Choctaw Nation and resulting in the judgment in *Choctaw Nation* v. *United States*, 119 U. S. 1.

6. The Commission created by the Choctaw Tribal Council pursuant to the treaty of June 22, 1855, *supra*, to hear and adjudicate claims was a quasi-judicial tribunal, whose judgments are not subject to collateral attack. The Act of Congress of March 3, 1881, clothed the Choctaw Nation, as plaintiff in the case, with full power and responsibility of hearing claims and making payment thereon to all persons, whether claimants under Artice 14 or other claims.

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such, inhabiting a particular territory, and with whom treaties had been or might be made. These peculiarities would rather give them the character of tribes. The word 'band' implies an inferior and less permanent organization, though it must be of sufficient strength to be capable of negotiating hostile proceedings."

3. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 23 S. Ct. 216; *Creek Nation* v. *United States*, 295 U. S. 102; *United States* v. *Kagama*, 118 U. S. 375, 30 L. ed. 228, 6 S. Ct. 1109

The Congress under its plenary powers could have designated any instrumentality, state, tribal or federal, to adjudicate these claims and disburse the money to the claimants.[4]

7. The opinion below properly holds that the Choctaw Nation was a party at interest, as it is clear that the United States, as trustee, proposed to charge the Choctaw Nation's trust funds with any amount awarded petitioners. It, therefore, had a pecuniary interest in the outcome of the litigation.[5]

8. Petitioners submitted no proof of a direct nature to the effect that their ancestors did not share in the judgment of *Choctaw Nation* v. *United States*, 119 U. S. 1. The Commission's judgment is supported (*1*) only by the evidence that no record of individual payments existed in the office of the United States Commissioner of Indian Affairs or is shown in the reports of the General Accounting Office, and (*2*) the dictum of the Federal Court of the Indian Territory in *Amos* v. *Choctaw Nation*. The letters of the Assistant Commissioner of Indian Affairs, relied upon by petitioners as showing no payment, merely reflected that the records in the Indian office at Washington showed no such payments, whereas the records of the Choctaw Claims Commission were in the archives of the Oklahoma Historical Society of Oklahoma City, Oklahoma, and not in Washington. The Congress passed an act approved March 27, 1934 (48 Stat. 501), wherein it was provided that all of the records of the tribal governments of the Five Civilized Tribes should

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4. *United States* v. *Bessie Wildcat*, 224 U. S. 112, 61 L. ed. 1024;
In re McDade's Estate, 218 Pac. 532;
Folk v. *United States*, 233 Fed. 191;
Page v. *Atkins*, 208 Pac. 807;
Malone v. *Alderice*, 212 Fed. 688;
Nunn v. *Hazelrig*, 216 Fed. 330.

5. *McGee* v. *Creek Nation*, 122 Ct. Cls. 380.

be deposited in the archives of the Oklahoma Historical Society at Oklahoma City, with authority given to the Secretary of the Society to make certified copies of said records where needed.

The expression of the Federal Court in *Amos* v. *Choctaw Nation* to the effect that petitioners' ancestors received nothing under the proceeds award, was purely dictum, in that the only issue before the court was the question of the right of Amos to enrollment as a member of the tribe.

9. The Government, and the Choctaw Nation as intervener, in the hearings on motions to reopen the case offered records of the Choctaw Claims Commission to show as a matter of fact that heirs of some twenty heads of families on the 191 schedule of 14th Article claimants actually appeared before the Choctaw Commission and received awards for losses under Article 14. The names on the 191 schedule mentioned by the Court of Claims coincided perfectly with the names of Indians whose heirs appeared before the Choctaw Commission and sought recovery for losses under Article 14. These documents constituted positive evidence that heirs of Indians whose names appeared on the 191 schedule actually participated in the distribution of the funds paid over to the Choctaw Nation in satisfaction of the judgment in the *Net Proceeds* case.

10. If in fact petitioners' ancestors had rights as persons entitled to share in the item of $417,656.00, they could not under the rules of estoppel claim an interest in the money recovered and at the same time deny the right of the Choctaw authorities to join them as parties at interest in the case.

11. We submit that it is immaterial whether the $417,656.00 was wrongfully paid by the Government to the Choctaw authorities, for the reason that the proof shows

that heirs of 14th Article claimants in twenty instances actually participated in the proceeds of the recovery in the *Net Proceeds* case. See comparative list of names on the 191 Court of Claims schedule and petitions by heirs filed with the Choctaw Claims Commission.

12. It is clear that under the Treaty of 1855 and the jurisdictional act of 1881 that payment of the proceeds of the judgment could only have been made to the Choctaw Nation.

It is also clear from the records before the Claims Commission that all of the proceeds of the judgment in *Choctaw Nation* v. *United States, supra*, was paid to those entitled to share in the judgment except an unaccounted for balance of $22,000.00. Thus there was evidence before the Indian Claims Commission showing that the Choctaw authorities had in fact complied with the provisions of the Treaty of 1855, wherein it had assumed the responsibility of hearing all claims and making awards thereon.

Conclusion.

It is respectfully submitted:

1. That there was in fact no award for $417,656.00 to 14th Article Indians, for the reason that that specific finding by the Court of Claims was reversed by the Supreme Court. Hence the whole theory of petitioners below that their ancestors had a right to $417,656.00 is based upon a mistaken assumption of facts.

2. Petitioners' ancestors had the right under Article 14 to reestablish citizenship in the tribe West. In fact, the treaty provided that they did not lose the right of citizenship but only lost annuities in case they removed. Hence

they were so far identified with the Choctaw tribe as to be embraced within the provisions of the Treaty of 1855 and the jurisdictional act of 1881.

3. Petitioners are not an identifiable group under the Claims Commission Act of August 13, 1946.

4. Even if petitioners could be held to be an identifiable group, the Congress had the plenary power to legislate for them as a dependent Indian tribe. *Lone Wolf* v. *Hitchcock*, 187 U. S. 553, 47 L. ed. 299, 23 S. Ct. 216.

5. The Commission created by the Choctaw Tribal Council to adjudicate claims under the jurisdictional act of March 3, 1881, was a quasi-judicial tribunal, whose judgments cannot be collaterally attacked.

6. The court below properly held that the Choctaw Nation had the right under the Treaty of 1855 and the jurisdictional act of 1881 to include all claims based on Article 14.

7. The judgment of the Claims Commission is not supported by any tangible evidence but rests upon the negative statements in letters from the Indian Commissioner's office and the dictum in *Amos* v. *Choctaw Nation.*

8. The Government and the Choctaw Nation on hearings to reopen before the Commission, offered documentary evidence of the fact that heirs of 14th Article claimants participated in the recovery.

9. Petitioners cannot claim an interest in the $417,656.00 item (reversed by the Supreme Court) and yet deny that the Choctaw Nation had any right to include that item in the suit.

10. It is immaterial whether the $417,656.00 should have been paid to the Choctaw Nation or direct to petition-

ers' ancestors, for the reason that documentary proof in the trial below showed that heirs of 14th Article claimants actually participated in the recovery.

11. Under the Treaty of 1855 and the jurisdictional act of 1881, the payment of the proceeds of the judgment to the Choctaw authorities was legal and is binding upon petitioners.

It is respectfully submitted that the Court of Claims committed no error in reversing the judgment of the Indian Claims Commission and we therefore pray that the petition for *certiorari* be denied.

Respectfully submitted,

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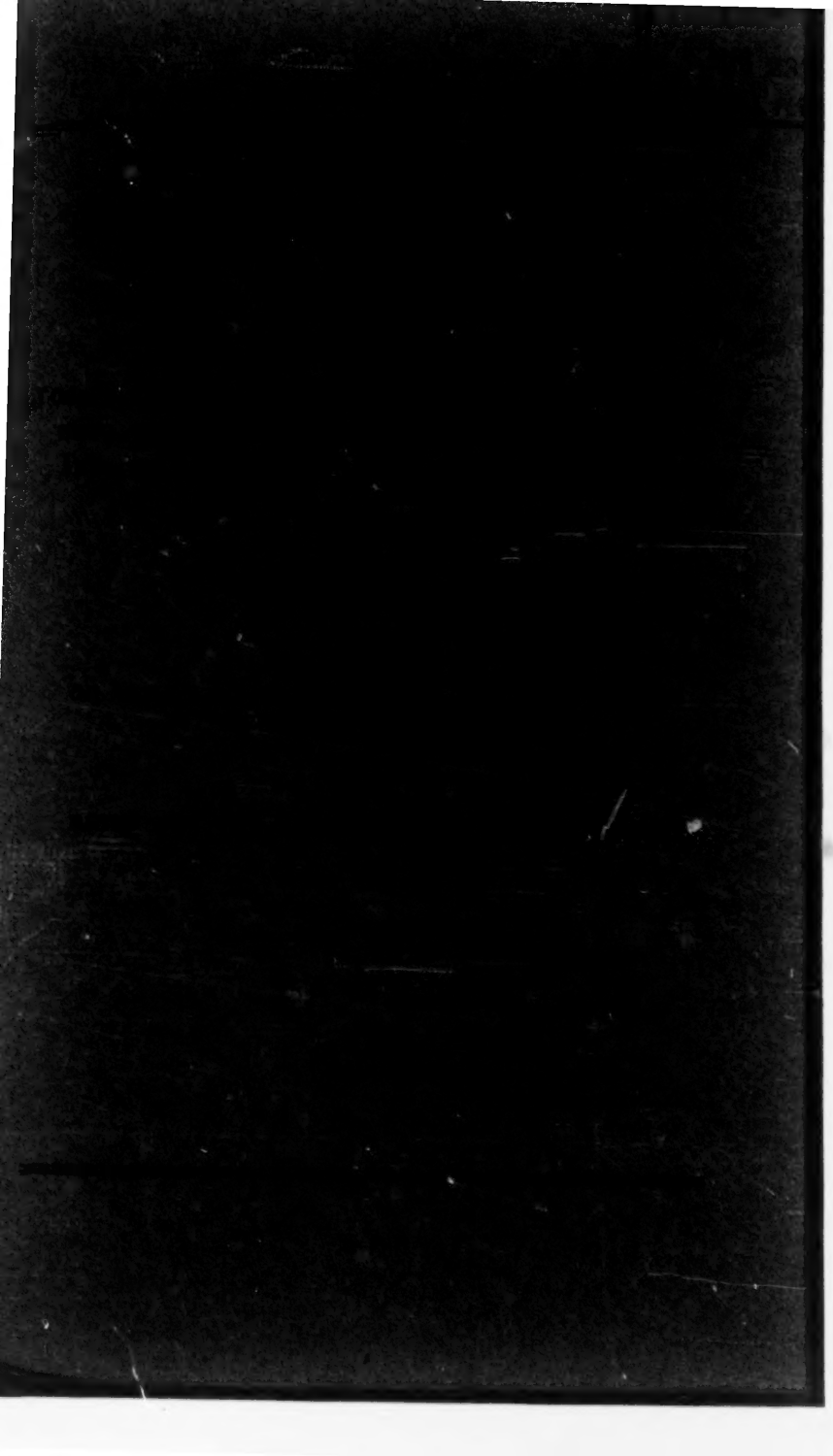

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 274

JOSEPH CHITTO, ET AL., MEMBERS, AND AS THE REPRESENTATIVES OF, AND ON THE RELATION OF, THE CHOCTAW INDIANS EAST OF THE MISSISSIPPI RIVER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims (Pet. App. 15-36; R. 3-20) is reported at 138 F. Supp. 253. The opinion of the Indian Claims Commission[1] is reported at 3 Ind. Cl. Comm. 288.

JURISDICTION

The judgment of the Court of Claims was entered on January 31, 1956. A motion for rehearing was over-

[1] Printed at pp. 23-42 of the separate record on appeal to the Court of Claims filed by petitioners as part of the record in this Court.

ruled on April 3, 1956. On July 2, 1956, petitioners' time within which to file a petition for a writ of certiorari was extended by Mr. Justice Black to July 23, 1956. The petition for a writ of certiorari was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

QUESTIONS PRESENTED

1. Whether, when pursuant to a treaty and a request by tribal authorities, funds were paid by the United States directly to the Choctaw Nation, the United States can properly be held liable for any possible failure of the Choctaw Nation to pay over those funds to the individual claimants entitled thereto.

2. Whether the claims petitioners assert were adjudicated in *Choctaw Nation* v. *United States*, 119 U.S. 1.[2]

STATUTES AND TREATIES INVOLVED

1. The text of Article 12 of the treaty of June 22, 1855, 11 Stat. 611, 614, is set out in the Statement, *infra*, p. 4.

2. Article 14 of the treaty of September 27, 1830, 7 Stat. 333, 335, is set out at page 44 of the petition.

3. The text of Section 2 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1050, 25 U.S.C. 70a, in pertinent part, is set out at page 45 of the petition.

STATEMENT

Petitioners commenced this action by filing a complaint before the Indian Claims Commission. As

[2] In the event certiorari should be granted, the further question, left open by the Court of Claims (Pet. App. 36), whether petitioners constitute an identifiable group entitled to sue under the Indian Claims Commission Act rather than simply an aggregation of individuals, will be presented as an additional basis for affirmance.

amended, the complaint asserts a claim for 1,404,640 acres of land in the State of Mississippi. It is based upon the provisions of Article 14 of the Treaty of Dancing Rabbit Creek, concluded on September 27, 1830 (7 Stat. 333, 335, set out at page 44 of the petition). Petitioners allege that they represent descendants of Choctaw Indians who were residing in Mississippi on September 27, 1830, and who did not move west after that date but became entitled to lands under Article 14. Those Indians, it is alleged, elected to take advantage of the provisions of Article 14, and to remain on individual allotments, but received no allotments or compensation therefor. The prayer in the amended complaint seeks, *inter alia*, "payment of the individual claims arising under said Article 14, in accordance with the obligations of the defendant in the treaty of 1855, with interest at 5% per annum, and costs" (Pet. App. 43).

Starting in 1853, the Legislative Council of the Choctaw Nation, largely as a result of the importunings of claimants situated both east and west of the Mississippi River, presented requests to the United States, under Article 14 and under other provisions of the treaty of 1830, for the settlement of all claims, individual and national. It further proposed to release the Government from all further obligation and liability for such individual claims, which the Choctaw Nation agreed to pay.[3]

Those requests finally reached the United States Senate and led to the ratification, on June 22, 1855, of a treaty with the Choctaw Nation (11 Stat. 611), which provided in Article 12 as follows (11 Stat. at 614):

[3] See *Choctaw Nation* v. *United States*, 119 U.S. 1, 20.

> In case the Senate shall award to the Choctaws the net proceeds of the lands, ceded as aforesaid [by the Treaty of 1830], the same shall be received by them in full satisfaction of all their claims against the United States, whether national or individual, arising under any former treaty; and the Choctaws shall thereupon become liable and bound to pay all such individual claims as may be adjudged by the proper authorities of the tribe to be equitable and just—the settlement and payment to be made with the advice and under the direction of the United States agent for the tribe; and so much of the fund, awarded by the Senate to the Choctaws, as the proper authorities thereof shall ascertain and determine to be necessary for the payment of the just liabilities of the tribe, shall on their requisition be paid over to them by the United States. But should the Senate allow a gross sum, in further and full satisfaction of all their claims, whether national or individual, against the United States, the same shall be accepted by the Choctaws, and they shall thereupon become liable for, and bound to pay, all the individual claims as aforesaid, it being expressly understood that the adjudication and decision of the Senate shall be final.

The Choctaw Nation, through its duly appointed representatives, then presented a memorial to the United States Senate praying that the Senate proceed to the adjudication of all unpaid claims, individual and national, according to the provisions of the 1855 treaty. The Senate awarded to the Choctaws the "net proceeds" of the lands, the exact amount of which was

later determined in an accounting by the Secretary of the Interior to be $2,981,247.30. The Civil War and reconstruction delayed action on the payment of the Senate award. In March, 1881, Congress passed a jurisdictional act[4] in pursuance of which the Choctaw Nation brought an action in the Court of Claims. *Choctaw Nation* v. *United States*, 21 C. Cls. 59. The Court of Claims, in 1886, found that 143 heads of families had received their allotments of land under Article 14 and that 1,150 others had been otherwise compensated, but that 191 were entitled to a judgment in the amount of $417,656. On appeal, this Court set aside that award and directed the entry of judgment in the amount of the Senate's "net proceeds" award plus other items. 119 U.S. 1.

The Choctaw Nation, through its General Council, requested and authorized the requisitioning from the United States and disbursing of the amount adjudged, and the United States Congress appropriated this sum and directed payment to the Choctaw Nation. Act of June 29, 1888, 25 Stat. 217, 239. It is not questioned that the Choctaw Nation received full payment of the "net proceeds" award (Pet. App. 32; R. 17). There is no evidence that the disbursing officer of the United States or anyone else knew of (or that there was in fact) any corruption on the part of anyone in the Choctaw Nation (Pet. App. 33; R. 18).

The Indian Claims Commission held that petitioners were entitled as a matter of law to recover from the United States the sum of $417,656. It found that the Choctaw Nation had not paid the petitioners' predecessors and, therefore, the United States "has failed

[4] 21 Stat. 504.

to discharge this liability to petitioners." The Court of Claims reversed (Pet. App. 15-36; R. 3-20). It held (Pet. App. 33-34; R. 18-19) that the finding that petitioners had not been paid was not supported by substantial evidence. It also held (Pet. App. 35; R. 19) that it was neither alleged nor proved that the Government was in any way derelict in any duty it owed petitioners or their ancestors.

ARGUMENT

1. Petitioners have no right to recover on any theory because they failed to prove that they have not received their share of the amount adjudged by this Court in *Choctaw Nation* v. *United States*, 119 U.S. 1. That amount was paid to the Choctaw Nation. Certainly, the burden is not upon the United States to produce records showing that the Choctaw Nation made the payments to its members, nor may it be assumed that they were not made. Petitioners simply assert that the records of the United States showed that the payments were not made and that the Court of Claims did not give any reason why the finding of the Indian Claims Commission to that effect was not supported by substantial evidence (Pet., p. 8). But the Court of Claims does discuss the matter in some detail (Pet. App. 33-35, fn. 2; R. 18-19). This discussion amply supports the court's conclusion, we submit, and, in any event, the weight of the evidence does not present an issue warranting review by this Court.

Under the circumstances of this case, there was not, and could not be, a finding that there was a failure to pay petitioners resulting from a negligent or wrongful act of some federal official, as the Court of Claims expressly pointed out (Pet. App. 33; R. 18). Thus, a

second essential element of petitioners' claim is lacking, namely, a showing that the United States was a guarantor of payment to all of the individual Indians entitled thereto. The Court of Claims correctly held that Article 12 of the 1855 treaty imposed no such extreme obligation (Pet. App. 32-33; R. 17-18). Had Congress intended this obligation, it is only reasonable to suppose that it would have directed the Secretary of the Interior to make the necessary distribution to individuals, and, in that connection, to make all required adjudications. Instead, Article 12 (*supra*, p. 4) vested the adjudicative function in the proper authorities of the Tribe, and the Act of Congress appropriating the necessary funds provided that the money be paid "from time to time, and in such sums as requisition or requisitions, therefor shall be made, by the proper authorities of the Choctaw Nation, *to the National Treasurer of said Nation*, or to such other person or persons as shall be named in said requisitions therefor * * *" (25 Stat. 217, 239; emphasis added).

2. Petitioners discuss issues as to their rights under Article 14 of the treaty of 1830, and challenge the express holding of the Indian Claims Commission,[7] concurred in *sub silentio* by the Court of Claims, that this Court conclusively settled the nature and extent of such rights in *Choctaw Nation* v. *United States*, 119 U.S. 1. The argument is that that decision involved simply the Choctaw Nation which had moved to Oklahoma and that therefore it could not bind the Choctaws east of the Mississippi. But the statutes, treaties, and the opinion of this Court in the 1886 litigation make

[7] 3 Ind. Cl. Comm. at pp. 300-302; pp. 30-33 of the record on appeal to the Court of Claims filed by petitioners as part of the record in this Court.

clear that that suit covered and was designed to settle the claims of Choctaw Indians generally, regardless of whether they were living east or west of the Mississippi River.

It is undisputed (see Pet. 1-2) that the claims petitioners now assert grow out of the 1830 treaty between the United States and the Choctaw Nation. As this Court pointed out in *Choctaw Nation* v. *United States*, *supra*, at 2, the jurisdictional act there involved (Act of March 3, 1881, 21 Stat. 504) provided, *inter alia*, "That the Court of Claims is hereby authorized to take jurisdiction of and try all questions of difference arising out of treaty stipulations with the Choctaw Nation,-and to render judgment thereon * * *." Thus "all questions" arising out of treaties with the Choctaw Nation were there included—not just questions concerning Choctaws on a particular side of the Mississippi River—and under the jurisdictional act the Choctaw Nation was designated as the recognized representative of all Choctaw Indians and their claims, individual or national.[6]

Similarly, Article 12 of the treaty of January 22, 1855, 11 Stat. 611, 614, provided:

> In case the Senate shall award to the Choctaws the net proceeds of the lands, ceded as aforesaid [by the Treaty of 1830], the same shall be received by them in full satisfaction of all their claims against the United States, whether national or individual, arising under any former treaty * * *.

---

[6] In *Winton* v. *Amos*, 255 U.S. 373, 392, this Court also took occasion to point out that Congress expressly provided for the representation of the Choctaws in Mississippi by the governor of the Choctaw Nation. See, also, Act of April 26, 1906, 34 Stat. 137, 140; Act of May 29, 1908, 35 Stat. 444, 457.

Again, the claims of *all* Choctaws were included. There is no basis for finding in that clear and dispositive jurisdictional grant a limitation to Choctaws living on one side of the river only. Indeed, by claiming an interest in the $417,656 item to which the Court of Claims found 191 claimants under Article 14 of the 1830 treaty were entitled (21 C.Cls. 59, reversed, 119 U.S. 1), petitioners at least impliedly acknowledge that the Choctaw Nation had a right to include that item in the 1886 suit and that the courts had a right to adjudicate the matter.

It seems clear, then, as the opinion of this Court demonstrates, that in the litigation reported at 119 U.S. 1, this Court properly considered and resolved the claims petitioners seek to revive, and that, even apart from the critical failure to show that the claims were not in fact paid (*supra*, p. 6), this suit is barred by *res judicata*. The barrier is not avoided by the suggestion (Pet. 11) that the earlier decision went "on legal and equitable grounds" rather than on the "moral obligations" encompassed by the Indian Claims Commission Act. For that decision dealt precisely with the obligations of the United States as dictated by "justice and fair dealing," not merely with liabilities under the rules of law and equity. See 119 U.S. at 32, 35, 39. Indeed, the fact that "moral obligations" were the basis of the Senate award, which this Court enforced as the measure of recovery, was pointed up in the dissent of the Chief Justice who used those very words to describe it. *Id.* at 42.

In short, the claims petitioners assert have in fact been granted and paid to the Choctaw Indians. A second recovery would be wholly unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

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AUGUST, 1956.

☆ U. S. GOVERNMENT PRINTING OFFICE 1956 330145 178

FILED
OCT 2 1956
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 274

JOSEPH CHITTO, ET AL., MEMBERS, AND AS THE REPRESENTATIVES OF, AND ON THE RELATION OF THE CHOCTAW INDIANS EAST OF THE MISSISSIPPI RIVER v. THE UNITED STATES.

THE UNITED STATES v. JOSEPH CHITTO, ET AL., MEMBERS, AND AS THE REPRESENTATIVES OF, AND ON RELATION OF, THE CHOCTAW INDIANS EAST OF THE MISSISSIPPI

Appeal of the Choctaw Nation from Order of The Indian Claims Commission Denying Motion for Leave to Intervene

PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE COURT OF CLAIMS

REPLY BRIEF OF JOSEPH CHITTO, ET AL., ON RELATION OF THE CHOCTAW INDIANS EAST OF THE MISSISSIPPI RIVER TO THE BRIEF OF THE CHOCTAW NATION WEST.

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This cause originated before the Indian Claims Commission as Docket 52 before that party by original petition. And also by a second amended petition and was heard by the Indian

Claims Commission on various and sundry motions. And on the hearing of the merits.

On oral evidence and documentary evidence tending to show that the Choctaw Indians east have never been paid for their lands that was reserved for them under the treaty of 1830. After the Indian Claims Commission heard and considered the matter that made an award of $417,656 on the second amended petition and after the award was made the Choctaw Nation in what is now Oklahoma filed a petition to intervene in the cause before the Indian Claims Commission and which said intervention was denied by the Commission. And the United States Government through its duly constituted attorneys appealed to the United States Court of Claims and also the Choctaw Nation appealed to the United States Court of Claims and which said court of claims reversed the Indian Claims Commission and from the judgment of the court of claims an appeal has been taken to the United States Supreme Court and petition for writ of Certiorari has been filed by the said Joseph Chitto, et al., to review the judgment of the court of claims and the Choctaw Nation in what is now Oklahoma has filed a brief through its duly constituted attorney, to-wit, the Honorable W. F. Semple and said brief undertakes to set forth certain grounds to sustain the action of the United States Court of Claims.

On page 7 of the Brief by Mr. Semple he submits that there is no question of public or general interest involved. We respectfully submit that there is a public interest involved. That the Indians of Mississippi claims that they never received any benefits from any of the sums claimed in this cause. They allege in the original petition and the amended petition that they have been deprived of their lands without due compensation having been made there for. In reply to the above Certiorari we respectfully submit that in script referred to was erroneous to begin with by the provisions of the treaty and the treaty reserved land for the ancestors of the Petitioners. It was not money but land. The defendant, the United States, through its Congress claimed in 1842 by the acts of Congress August 23rd, 1842, Act March 1837 chapt 13, act 1845 chapt 72 Vol. 9, page

114 that there was not sufficient land left within the area ceded by the 1830 treaty where from they could receive their reservations. And therefore they passed the said act to issue script for the lands and arbitraries set the price of $1.25 an acre and promised by said act to pay interest on said script at 5%. The provisions for this was because it was claimed that the government had patented the land away to white people and therefore, the defendant could not comply with the terms of the treaty. This was an admission on the part of the defendant that they had not complied with the treaty and now claims that they could not comply with it. The record evidence introduced on the hearing of the Case No. 52 that at this time there was vast tracts of land being patented to white people and much of it was patented even in the year 1900 which reviewed the claim that they did not have any land to reserve to the Choctaws. And the so-called Senate award was made for avowed purpose of correcting this situation. The Senate in making said award failed to take into consideration the fact that the reservation already ask for had not been fulfilled. Neither did they take into consideration the value of the property of the Indians, nor the improvement made upon any premises where on they resided. The treaty itself provided that the land should not be surveyed for sale to individuals until after the survey or location had been made for the reservees under the said treaty.

The provisions of the treaty provided that the reservees location should be on the land and to include the land where he resided if he or she was the head of a family and then a tract of ½ section to ajoin that to the head of the family to each child over 10 years of age and unmarried and each child under 10 years of age ¼ section. This was to all be included in one body and located and surveyed and bonded before any patents could be issued to any white person and the records introduced Exhibit No. 53 was that this was never complied with in any instances. But that survey began for division of the land into their sections, townships and ranges for the purpose of sale to white people. And Indians were driven from their homes without the privilege of redress for all the injuries of and dispossession of, to recover their possession by the Act of Congress date

of March 1863 also see act of Congress Sept. 20, 1850 see record pages 243 to 244 Exhibit No. 53 Laws of Miss. act 1857 page 510. The interest was discontinued on the payment of the script. And further reply to this state of affairs let it be recalled that the defendant took upon itself a self appointed guardian for those people and continued its Guardianship over the Indians who went west and composed the Choctaw Nation but they disregarded its duties as Guardian of the Petitioners ancestors and turned them out on a merciless world. A Guardian who had no regard for their rights or privileges whatever. That they were deprived of redress in the court and the only way that they had of seeking redress was through the United States Court of Claims which the defendant by act of Congress on the 3rd day of March, 1863, took away from them this right left the situation as follows: A white man could redress against the government through the said Court of Claims. A negro could likewise or any other Nation over the world but an Indian whose rights had been taken away from him and had been reduced to the most abject poverty and distress and the defendant has self appointed guardian stood aloof from the defense of the ancestors and never uttered a word of protest nor performed a single act toward the protection of the ancestors of your Petitioners but according to all evidence defendant have condoned and abetted the plans and schemes which deprived the ancestors of your Petitioners of their rights and privileges that they were entitled to under the Constitution and laws of the United States of America.

We would now most respectfully call attention to the 14th Article of the Treaty of 1830, which provided that a reservation of land could be made by the Indians electing to select land under the said Article. And especially at this time do we call attention of the court that a treaty is the Supreme Law of the land by and under the terms of the Constiution of the United States of America.

Article 5 of the Constitution reads as follows, to-wit:

2. "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made,

or which shall be made, under the Authority of the United States, shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

On the 23rd day of August, 1882, Congress passed an act wherein it is recited in the said act that it is now impossible for the United States to make or give reservations to those Indians, who were entitled to land under the treaty of 1830, and that statement was made with the full knowledge of the fact that there was very much land available in the United States and in the State of Mississippi, whereas they could have found sufficient land to have supplied the obligations of the United States by said Treaty. (As shown by Exhibit 147 of the Petitioners, on page 216 of the record, and photostatic copy of Exhibit 50, page 235 of the record, Exhibit 51, page 241 of the record, Exhibit 53, page 244 of the record, Exhibit 54, page 246 of the record, Exhibit 150, page 286 of the record, Exhibit 151, page 286 of the record, Exhibit 152, page 287 of the record, Exhibit 153, page 287 of the Record, Exhibit 154, page 300 of the record).

The same act provides that the defendant would issue an instrument of paper called "Script" in lieu of the said lands, and by and under the provisions of said act an Indian, who was entitled to reservations of land under the Treaty of 1830, could take this instrument and enter a like number of acres in either Louisiana or Arkansas on any unappropriated lands in said state, and that the said Script was never delivered to the Indians, that the script was delivered under this provision to persons, who claimed to be agents thereof, a sample of which is hereby mentioned and which is shown by the record and will be referred to hereinafter more fully. Prior to this Act of 1842 and between the years of 1830 and 1840 the Indians had made strong efforts to obtain their reservations; and the agent, who had been sent to Mississippi, to-wit: Colonel Ward, had refused almost all of them the privilege of registering themselves, as shown by records already referred to, and that a Commissioner, T. L. McKinney, was sent to the State of Mississippi and held several meetings, one being at Hopokka, and in order to make an effort to obtain their rights, many of them made contracts

with the Indians, as shown by record page 202, and made a contract with one named Anguish McIntyre as agent, which is Exhibit 23 of Petitioners' evidence, and which has been duly certified as being a part of the records of Leake County, Mississippi, recorded in Deed Book B, Page 33 of said records, date of contract being December 22, 1835, and they have contracted with the same agent for the purpose of proceeding to obtain their lands for them, even offering to give one-half of the lands to the agent, if successful. Also, a number of Indians executed on October 2, 1837 another Power of Attorney to the same person as shown by Deed Book A, page 311 of the records of the Chancery Clerk's office of Leake County, Mississippi, duly certified and marked Exhibit 24. Also, other Indians entered into contracts with Daniel P. Johnston and John Riley, on the same subject matter, recorded in Deed Book A, page 143 of the records of the Chancery Clerk's office of Leake County, Mississippi, and marked in the record as Exhibit 25. Also, Exhibit 26, which is a contract between other Indians and Wm. M. Gwin and Charles Fisher, dated December , 1834. On February 3, 1836, other Indians contracted with John Ellis relative to the same subject matter, which is recorded in Deed Book A, Page 79 of the records in the Chancery Clerk's Office of Leake County, Mississippi. Also quite a number of Indians contracted on July 19, 1835 relative to the same subject matter, as shown by Exhibit 28; Also, Exhibit 29, which is a contract between said Indians and Elizabeth E. Forrester, dated September 4, 1849, and recorded in Deed Book 1, Page 76, of the records on file in the Chancery Clerk's office of Leake County, Mississippi. All of said Exhibits from 23 to 29 inclusive were for the purpose of obtaining their lands or some part thereof through the agents named therein, it having become evident to the Indians that there was no chance whatever of obtaining any relief from the defendant or any courts or administrative bodies whatever created by the defendant. And in lieu thereof, the said Act of 1842, Supra, was enacted. The Indians, having never been able to secure the reservations or any of their rights under any of the articles of said Treaty no matter what they did for said purpose, became evidently resigned

to their fate. No courts having been open to them, they were helpless, and no one thereafter apparently tried to espouse their cause.

By Act of Congress approved February 24, 1855, what is known as the Court of Claims was established. This Act gave jurisdiction to the Court of Claims to hear and determine claims against the United States, and by said Act they had jurisdiction as follows:

"And the said Court shall hear and determine all claims founded upon any law of Congress or upon any regulation of an executive department or upon any contract express or implied with the Government of the United States, * * * and also all claims which may be referred to said court by either house of Congress."

It is apparent, and I believe that it could have been construed to include a claim of an Indian. However, by Act of Congress approved March 3, 1863, this Act of February 24, 1855 was amended, and as to jurisdiction the following amendment was made, to-wit:

"SEC. 9. And be it further enacted, That the new jurisdiction of the said Court shall not extend to or include any claim against the Government not pending in said Court on the first day of December, Anno Domini eighteen hundred and sixty-two, growing out of or dependent on any treaty stipulation entered into with foreign nations or with the Indian tribes."

This section closed the door of the Indians in this Court. If they ever had any right to sue in this Court, it was lost by this particular section. The claim against the defendant originated long before this Act was passed, and this Act excluded all their rights that they had prior to the year 1863, thus closing the door of hope for the Indians. The door opened now that lies before the Petitioners is based on Chapter 959, Public Law 726 (H. R. 4497) created what is known as the Indian Claims Commission, as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

There is hereby created and established an Indian Claims Commission, hereafter referred to as the Commission.

JURISDICTION.

SEC. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska:

(1) Claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) All other claims in law or equity including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States was subject to suit; (3) Claims which would result if the treaties, contracts and agreements between the claimant and the United States were revised on the ground of fraud, duress, unconscionable consideration, mutual or unilateral mistake, whether of law or fact, or any other ground cognizable by a court of equity; (4) Claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, or lands owned or occupied by the claimant without the payment of such lands of compensation agreed to by the claimant; and (5) Claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after the date of the approval of this Act shall be considered by the Commission.

All Claims hereunder may be heard and determined by the Commission notwithstanding any Statute of limitations or laches, but all other defenses shall be available to the United States." (U. S. Code Congressional Services. 78th Congress, Second Session, 1946, Pgs. 1015-1016).

We wish to call the attention of the Court to the history of the legislation relative to the preceding Statute just cited, which is covered by House Report No. 1466, December 20, 1845, found on page 1347 of the United States Code Congressional Service, 79th Congress, Second Session, 1946. In part said Report appears as follows:

° ° ° "The bill in its present form is primarily designed to right a continuing wrong to our Indian citizens for which no

possible justification can be asserted. Today any white man who has supplied goods or services to the United States under contract may, if the United States has failed to carry out its part of the bargain, go into the Court of Claims, or, in certain cases, into the Federal District courts, and secure a full, free and fair hearing on his claims against the Government. This is an integral part of the American system of Justice under which the humblest citizen and the highest official are equal before the law. The only American citizen today who is denied such recourse to the Courts is the Indian." Also, we quote again said Report in part, as follows:

* * * "Since the publication of the Merriam Report, an impartial study of the Indian problem made by the Institute for Government Research at the request of Secretary of the Interior Hubert Work in 1928, every group that has studied the problem of Indian claims has come to the conclusion that it is essential not only to grant the Indian his long-delay day in court, but also to set up an impartial fact-finding Commission which will facilitate the judicial solution of disputed cases, and will report directly to the Congress on those cases where the law is undisputed and the facts are clear."

Also, we find contained in the aforesaid Report under the heading "Purpose of the Bill," page 1349, the following, to-wit:

"The bill would establish such a body, responsible to the Court of Claims and the Supreme Court of the United States with respect to all legal controversies. It would require all pending Indian Claims of whatever nature, contractual and noncontractual, legal and nonlegal, to be submitted to this fact-finding body within five years, and would outlaw claims not so submitted. It would require a final disposition of all such claims within ten years, at which time the Indian Claims Commission would cease to exist. Moreover, in order to prevent any future accumulation of unsettled claims, the statutory prohibition against litigation in the Court of Claims growing out of agreements with Indian tribes would be lifted to secure a full and free hearing in the Court of Claims, or any other appropriate tribunal, on any controversy with the Federal Government that may arise in the future. Once Indian tribes are

It appears, however, that they did undertake to represent the Choctaws east of the Mississippi River and proceeded to collect what was due them and paid it out to Choctaws in the west and take the record as a whole which fails to show that the Choctaws of Mississippi ever received one cent. So it further appears that the treaty of 1830 has been made of no effect so far as the ancestors of your Petitioners show. And that their rights under the treaty was nullified by various and sundry acts of the defendant and have been utterly disregarded.

Respectfully submitted by

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